SUPREME COURT, U. S.

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1066

CITY OF PHOENIX, ARIZONA, and MILTON H. GRAHAM, FRANK G. BENITES, CHARLES CASE, JOHN J. LONG, MILTON SANDERS, MRS. DOROTHY THIELKAS, DR. MORRISON F. WARREN, Members of and concerning the City Council of the City of Phoenix, Arizona,

Appellants,

versus

EMILY KOLODZIEJSKI,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

APPELLANTS' SUPPLEMENTAL BRIEF

ROBERT J. BACKSTEIN
City Attorney
City of Phoenix
By ALAN K. POLLEY
Assistant City Attorney
Municipal Building
Phoenix, Arizona 85003
REX E. LEE
Special Counsel
111 W. Monroe
Phoenix, Arizona 85003
Attorneys for Appellants.

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In the Jurisdictional Statement, we pointed out that the Opinion and Judgment of the lower court are in conflict with a decision of the Fifteenth Judicial District Court of Louisiana. The Jurisdictional Statement further stated that "the conflict in this case does not involve the United States Courts of Appeal nor State Supreme Courts. . . ." Jurisdictional Statement p. 13.

Subsequent to the mailing of our Jurisdictional Statement, on December 23, 1969, the Supreme Court of Oklahoma handed down two separate decisions whose holdings are in square conflict with the holding of the district court in the instant case.

The holding of the lower court is therefore in conflict not only with a Louisiana district court decision, but also with two decisions of the Oklahoma State Supreme Court.

Because the substantiality of the federal question in this case is borne out by the conflict between the holding of the lower court and the holdings by the Oklahoma Supreme Court, the opinions of that Court are set forth in full as Appendices A and B to this Supplemental Brief.

Respectfully submitted.

ROBERT J. BACKSTEIN
City Attorney
City of Phoenix

By ALAN K. POLLEY
Assistant City Attorney
Municipal Building
Phoenix, Arizona 85003

REX E. LEE
Special Counsel
111 W. Monroe
Phoenix, Arizona 85003
Attorneys for Appellants.

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

Tom Settle

Plaintiff

vs.

The City of Muskogee, of the State of Oklahoma; John R. "Bob" Brown, Mayor; Mary Roberts, City Clerk; John Hart; Elmer E. Hoffman, Jr.; Russell Ruby; Frank Hendrickson; Fred Hager; Tom P. Bowen, Mal Kingins; Mary E. Basolo; Charles A. Heirich; Robert C. Coleman; James W. Buchanan; Dr. J. S. Chandler; William H. Pool; and Dr. Frederick D. Smith, constituting the Council of said City

Defendants

No. 43842

ORIGINAL PROCEEDING FOR WRIT OF INJUNCTION
WRIT DENIED

Jan Eric Cartwright
Muskogee, Oklahoma — For Plaintiff

George J. Fagin and Andrew J. Haswell, Jr.
J. Scott Brown of Counsel
Oklahoma City, Oklahoma

Chal Wheeler
Muskogee, Oklahoma

Andrew C. Wilcoxen, Jr.
Muskogee — For Defendants

J. B. Marshall
Edmond, Oklahoma — For Amicus Curiae
Oklahoma Municipal League

Fielding D. Haas
Norman, Oklahoma — For Amicus Curiae City of Norman

G. T. Blankenship, Attorney General of Oklahoma
Tim Leonard, Assistant Attorney General — For Amicus Curiae

Roy H. Semtner, Municipal Counselor
James R. Fuson, Assistant Municipal Counselor — For Amicus Curiae City of Oklahoma City

DAVISON, J.

This is an original action in this court in which we are called on to determine the validity of Art. 10, §27, of the Oklahoma Constitution. Plaintiff contends Art. 10, §27, is unconstitutional on the gronnd that the limitation therein, requiring persons voting at the election therein to be "qualified property tax paying voters," violates the equal protection clause in the Fourteenth Amendment to the United States Constitution.

We accept original jurisdiction of the action because of the public importance of the matter and the need for an early determination of the involved question.

There is no dispute as to the following facts. Plaintiff is not a property taxpayer, but is an otherwise qualified voter in the City of Muskogee. On May 6, 1969, the City, under authority of Art. 10, §27, of the Oklahoma Constitution, held a special election submitting to the registered qualified property tax paying voters of the City the proposition of whether the City should incur an indebtedness by issuing its bonds in the sum of $750,000, to provide funds for the purpose of acquiring a site for and constructing, furnishing and equipping a public library to be owned exclusively by the City, and to levy and collect an annual tax upon all taxable property in the City sufficient to pay the interest,

and the principal of said bonds as they became serially due, within 25 years. The proposition received the required constitutional majority vote in favor thereof. Plaintiff was not allowed to vote in this election because he was not a property taxpayer.

The City commenced proceedings to sell the bonds. The Attorney General of Oklahoma, as ex-officio Bond Commissioner of the State of Oklahoma, duly approved said bonds.

Plaintiff then filed this action for himself and all others in his class against the City and its officers and council. He alleges the facts above narrated and further alleges his interest, and the interest of all members of the community, in the quality of public utilities and in the financing and construction of a public library, and his conclusion that property tax levels affect the price of goods and services in the community. He prays that the election be declared invalid and that the defendants be enjoined from issuing the bonds, on the ground that Art. 10, §27, violates the Equal Protection Clause.

Art. 10, §27, of the Oklahoma Constitution allows a city, by a majority of the "qualified property tax paying voters" of such city, voting at an election held for that purpose, to become indebted *in a larger amount than that specified in Section 26*, for the purpose of purchasing or constructing utilities, or for repairing the same, to be owned exclusively by such city; and provides that the city shall collect an annual tax in addition to the other taxes provided for by the Constitution, sufficient to pay the interest and principal of such indebtedness within 25 years.

Art. 10, §26, of the Constitution provides, among other things, that no city shall be allowed to become indebted to an amount exceeding, in one year, the income and revenue provided for such year, without the assent of three-fifths of the *voters* thereof, voting at an election held for that purpose, "nor in cases requiring such assent, shall any indebtedness be allowed to be incurred to an amount including existing indebtedness, in the aggregate ex-

ceeding five per centum of the valuation of the taxable property therein, * * *."

The sole issue presented in this case is whether the classification of voters in Art. 10, §27, violates the Fourteenth Amendment's command that no State shall deny persons the equal protection of the laws, by providing that only qualified property tax paying voters are permitted to vote for the purpose therein set forth, and thereby rendering ineligible to vote those otherwise qualified voters who do not pay taxes on real or personal property.

In Henry v. Oklahoma City, 188 Okl. 308, 108 P.2d 148, 152, involving the duties of election officials, we stated that the purpose of the above provision in Art. 10, §27, was to render those qualified voters who do not pay taxes on real or personal property ineligible to vote at an election on the proposition of incurring indebtedness for municipally owned public utility improvements.

This court in many cases (including Bekins v. City of Tulsa, Okl., 299 P.2d 792; City of Shawnee v. Williamson, Okl., 338 P.2d 355, and City of Tulsa v. Williamson, Okl., 276 P.2d 209) has approved numerous bond issues and determined questions raised in connection therewith, all of which arose out of elections held pursuant to Art. 10, §27. However, none of our cases involved the issue now presented to this court.

From our examination of the authorities we conclude that mere classification of persons for franchise or other purposes is not of itself invalid. The test of the validity thereof is whether, under the circumstances, the classification complies with, or violates, the stated rules of law governing such situations.

In Haas v. Holloman, Okl., 327 P.2d 655, we stated the rule that where a statute operates upon a class, the classification must not be capricious or arbitrary and must be reasonable and pertain to some pecularity in the subject-matter calling for the legislation.

And, in Walters v. City of St. Louis, 347 U.S. 231, 98 L.Ed. 660, 74 S.Ct. 505, (1954) the court stated:

" ***. Equal protection does not require identity of treatment. It only requires that classification rest on real and not feigned

differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary."

The United States Supreme Court has held that States may, within limits, fix voter qualifications.

In Carrington v. Rash, 330 U.S. 89, 13 L.Ed.2d 675, 85 S.Ct. 775, (1965) the court said:

" ***. There can be no doubt either of the historic function of the States to establish, on a nondiscriminary basis, and in accordance with the Constitution, other qualifications (than residence) for the exercise of the franchise. Indeed '[t]he States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised' Lassiter v. Northhampton Election Bd., 360 U.S. 45, 3 L.Ed.2d 1072, 1076, 79 S.Ct. 985."

We also find in Avery v. Midland County, Texas, 390 U.S. 474, 20 L.Ed.2d 45, 88 S.Ct. 1114 (1968), the following statement: "The Constitution does not require that a uniform straitjacket bind citizens in devising mechanism of local government suitable for local needs and efficient in solving local problems."

Plaintiff cites and relies upon Kramer v. Union Free School District, ...U.S....., 23 L.Ed.2d 583, 89 S.Ct. 1886 (1969), and Cipriano v. City of Houma, ...U.S....., 23 L.Ed.2d 647, 89 S.Ct. 1897 (1969). In the Kramer case a law of the State of New York establishing a classification of voters permitted to vote at a school board election was declared unconstitutional. In the Cipriano case a law of the State of Louisiana giving only "property taxpayers" the right to vote in elections called by a municipality to approve the issuance of revenue bonds for the purpose of acquiring, extending or improving revenue-producing public utilities was declared unconstitutional.

Our approach to the determination of the question presented in the case now before us will be that used in the Kramer case in which the court stated as follows:

"'In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances of the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification.' Williams v. Rhodes, 393 U.S. 23, 30, 89 S.Ct. 5, 10, 21 L.Ed.2d 24 (1968)."

We construe Kramer and Ciprjano to hold that a statute or a state constitutional provision having a voter classification restricting the right to vote to one class, thus denying it to another class, is not violative of the equal protection clause, (1) where the exclusions are necessary to promote a compelling state interest, and (2) where those excluded are in fact substantially less interested or affected than those included. We also consider the question of whether the classification in Art. 10, §27, limits the franchise to those voters "primarily interested." These are the tests to be applied to Art. 10, §27, Oklahoma Constitution.

Under the provisions of Sec. 27, the election is held, not only to secure approval of incurring municipal indebtedness, but to also secure approval of the important and essential matter of levying a specific additional tax on the property of taxpayers sufficient to pay the principal and interest of the indebtedness. An otherwise sufficient vote pursuant to Sec. 27, is without effect unless provision is made to make the tax levy. Application of City Council of City of Tahlequah, Okl., 285 P.2d 418. When this procedure is followed and the property tax paying voters approve the debt and levy of taxes upon their property, the city may incur indebtedness in excess of the debt limitation of five per centum of the valuation of taxable property otherwise prescribed in Art. 10, §26. In this manner a city may incur indebtedness greater than that allowed by Sec. 26.

It is self-evident that the drafters of the Constitution recognized the need and value of public utilities to the State's people and economy, and it is also apparent that they knew the importance of municipal solvency. Thus, the general electorate may vote on the creation of indebtedness to the extent provided in Sec. 26, but

authorization of indebtedness in excess thereof was restricted by Sec. 27 to a favorable vote by property tax paying voters, whose property is subject to a tax levy to pay the approved indebtedness.

By such a plan and classification the solvency of Oklahoma's cities and towns is virtually assured and the taxpayers are given protection against confiscatory taxes. This conclusion is justified, because the power to authorize the city to incur unlimited indebtedness for public utility purposes is placed in the hands of those persons who pay the indebtedness and who have knowledge of the municipality's capability of satisfying its indebtedness from the proceeds of a special tax on their property. These are the compelling State interests.

We now turn to the question of whether the plaintiff and other persons excluded from voting by reason of not being taxpayers are substantially less interested or affected than those persons permitted to vote. In discussing this proposition in Kramer the court treated it as a part of the "compelling state interest" test. This is our construction of the Kramer decision.

Defendants admit that plaintiff is to some extent "interested," and we can conceive that plaintiff could be "affected" in some degree by reason of the city incurring indebtedness and levying a tax on property to finance a public utility (in this case a library), even though plaintiff is not a taxpayer. However, we are of the opinion that in the present situation the plaintiff is substantially less interested or affected than those persons permitted to vote in the election. Our prior discussion regarding "compelling state interest" supports this conclusion.

We point out that this is not an election for the selection of a person for a public office, whose official acts involve legislative or executive duties of a discretionary nature. The election is to incur municipal indebtedness, and the result thereof and the law control the later action to be taken relative to the subject matter. We emphasize that this is an election under a constitutional provision authorizing an indebtedness in excess of the maximum

amount the general electorate may approve. It is to be satisfied by a tax paid by property taxpayers who are primarily interested or affected by reason of an increase in the city's debt and their taxes. Plaintiff does not pay any tax. His resulting detriment or expense, if any, arising from the higher tax level, is a proportionate part of the relatively small additional expense spread across the population of the city. The extent to which plaintiff is interested or affected is indirect and remote.

It is our conclusion that Art. 10, §27, Oklahoma Constitution, complies with the test requirements set forth in Kramer and Cipriano.

It is our further conclusion that Art. 10, §27, validly limits voting to those persons "primarily interested."

The facts in Kramer and Cipriano are not the same as those in the present case.

In Kramer the classification involved persons entitled to vote at a school board election. The statute presented a complicated formula under which the only persons entitled to vote were those falling within one or more classifications, consisting of the owner or lessee of taxable property, or the spouse thereof, or the parent or guardian of a child enrolled in school for a specified time during the preceding year. The court demonstrated and found that the classification permitted inclusion of persons who had, at best, a remote and indirect interest in school affairs, and excluded others who had a distinct and direct interest in school meeting decisions. The court said the requirements of the law were not sufficiently tailored to limiting the franchise to those "primarily interested" in school affairs. This is not the situation in the present case.

In the Cipriano case the law restricted voting on public utility *revenue* bonds to property taxpayers. The revenue bonds were not financed in any way by property tax revenue, but were paid only from revenue deprived from operations of the utilities. The court said that both property owners and non-property owners used the

utilities and paid the rates, and consequently the statutory classification excluded otherwise qualified voters who were as substantially affected and interested in the matter voted upon as were those who were permitted to vote. In the present case the bonds are not revenue bonds. They are paid by the property taxpaying voters.

It is our conclusion that Art. 10, § 27, of the Oklahoma Constitution does not violate the Equal Protection Clause of the Fourteenth Amendment.

Writ denied.

ALL JUSTICES CONCUR.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Tom Settle, Plaintiff vs. Board of County Commissioners of the County of Muskogee, of the State of Oklahoma; Norman Brazil, Chairman, and Kenneth Ward, Member and Fred Shelton, Member, constituting the Board of County Commissioners of said County, Defendants	No. 43812

ORIGINAL PROCEEDING FOR WRIT OF INJUNCTION
WRIT DENIED

Jan Eric Cartwright
Muskogee, Oklahoma — For Plaintiff

George J. Fagin and Andrew J. Haswell, Jr.
Oklahoma City, Oklahoma

Chal Wheeler
Muskogee, Oklahoma — For Defendants

G. T. Blankenship, Attorney General of Oklahoma

Tim Leonard, Assistant Attorney General — For Amicus Curiae

J. B. Marshall
Edmond, Oklahoma — For Amicus Curiae
Oklahoma Municipal League

DAVISON, J.

Plaintiff files an original action in this court attacking the constitutionality of Art. 10, §35, of the Oklahoma Constitution, which was adopted at a special election held May 1, 1962. Plaintiff contends Art. 10, §35, is unconstitutional on the ground that the requirement therein, limiting voting at the election therein provided to "qualified taxpaying voters," violates the equal protection clause in the Fourteenth Amendment to the United States Constitution.

We accept original jurisdiction of the action because of the public importance of the matter and the need for an early determination of the question.

This case presents an issue similar to the one considered in Settle v. City of Muskogee, Oklahoma, ...P.2d....., this day promulgated.

The parties agree on the following facts. Plaintiff is not a real or personal property taxpayer of Muskogee County, but is otherwise qualified to vote in Muskogee County. On September 9, 1969, the County, under authority granted in Art. 10, §35, held a special election submitting to the registered qualified taxpaying voters of the County the proposition of whether the County should incur an indebtedness by issuing its bonds in the sum of $2,000,000, to provide funds for the purpose of securing and developing industry in the County, and to levy and collect an annual tax upon all real and personal property in the County but not in excess of 5 mills, sufficient to pay the principal and interest on the bonds as they became due, within 30 years. The proposition received the required favorable vote. Plaintiff was denied the right to vote because he was not a taxpaying voter.

The County officers are now threatening to issue a portion of the bonds and use the proceeds for the purposes set forth in the Proposition.

Plaintiff filed this action against the County and its Commissioners, alleging the facts above set out, alleging he and the mem-

bers of the community have an interest in the development of new industry and the resulting change in the economic structure, and that all qualified electors should be allowed to vote on the Proposition. He alleges that the level of property taxation affects the price of goods and services. He prays that the election be declared invalid and the defendants enjoined from issuing bonds on the ground that Art. 10, §35, and the election violate the Equal Protection Clause.

Art. 10, §35, Oklahoma Constitution, provides that a county may, by consent of the majority of the "qualified taxpaying voters" of the county voting at an election thereon, issue bonds for the purpose of securing and developing industry within the county, and levy a special annual tax, not to exceed 5 mills on the dollar, on the real and personal taxable property therein to pay the bonds within 30 years. It provides that the county commissioners shall have jurisdiction over the sale of the bonds and that they shall economically expend the funds, and give them authority to coordinate their industrial development plans and projects insofar as practical with those of local industrial development agencies.

The sole question presented is whether the exclusion of plaintiff from voting on the bonds, because he was not a property taxpayer, violates the equal protection clause in the Fourteenth Amendment.

In Settle v. City of Muskogee, supra, we stated the general rules of law governing classifications of persons and voters, citing Haas v. Holloman, Okl., 327 P.2d 655; Walters v. City of St. Louis, 347 U.S. 231, 98 L.Ed. 660, 74 S.Ct. 505 (1954) and Carrington v. Rash, 380 U.S. 89, 13 L.Ed.2d 675, 85 S.Ct. 775 (1965). We adopt these rules as being equally applicable in the present case.

In addition thereto, we find in Avery v. Midland County, Texas, 390 U.S. 474, 20 L.Ed.2d 45, 88 S.Ct. 1114 (1968), the following statements: "The Equal Protection Clause does not, of

course, require that the State never distinguish between citizens, but only that the distinctions that are made not be arbitrary or invidious," and "The Constitution does not require that a uniform straitjacket bind citizens in devising mechanisms of local government suitable for local needs and efficient in solving local problems."

Plaintiff cites and relies upon Kramer v. Union Free School District, ...U.S....., 23 L.Ed.2d 583, 89 S.Ct. 1886 (1969), and Cipriano v. City of Houma, ...U.S....., 23 L.Ed.2d 647, 89 S.Ct. 1897 (1969).

In determining whether Art. 10, §35, violates the equal protection clause, we consider the facts and circumstances of the law, the interests the State claims to be protecting, and the interests of those allegedly disadvantaged by the classification. Kramer v. Union Free School District, supra.

We construe Kramer and Cipriano to hold that a statute or state constitutional provision having a voter classification is not in violation of the equal protection clause, (1) where the exclusions are necessary to promote a compelling state interest, and (2) where those excluded are in fact substantially less interested or affected than those included. In connection with the above propisitions we also consider the question of whether the classification in Art. 10, §35, limits the franchise to those voters "primarily interested."

It is clear from the provisions of Art. 10, §35, that the Legislature in proposing the adoption thereof, and the electorate in adopting the same, concluded it was desirable and beneficial to secure and develop industry in the State. To accomplish this purpose, Sec. 35 provides a procedure by which the county may incur additional indebtedness and a means by which the indebtedness is to be paid. The decision to accomplish the purpose of Sec. 35, and to procure for the community the benefits contemplated therein, rests with the qualified taxpaying voters. Their decision to incur the debt for this particular purpose subjects their prop-

erty to a specific additional tax to satisfy the debt, with no liability on the part of non-taxpaying voters. In other words, taxpaying voters create the debt for this purpose, and only their property is ultimately liable for judgment of the debt.

We now take up the question of whether plaintiff and persons in his class are substantially less interested or affected than those persons permitted to vote.

We assume that plaintiff and some persons in his class are "interested," and we can conceive that they are "affected" in some small degree by the securing and developing of industry in the community with the resulting contemplated benefits. However, we are here dealing with a distinct classification, those who are directly interested and affected by incurring the debt and subjecting their property to taxes for a special purpose, and those who in our opinion are indirectly and remotely affected by such action. This is not like an election to select for public office, the impact of whose official and discretionary acts directly affect the people as a whole or voters as a group.

It is our conclusion that Art. 10, §35, validly excluded plaintiff and his class from voting to promote a compelling state interest. It is our further conclusion that plaintiff and his class are substantially less interested or affected than the property taxpaying voters permitted to vote at the election.

Based upon these conclusions and the circumstances of this case, we are of the opinion that Art. 10, §35, validly limits voting to those persons "primarily interested."

In our decision in Settle v. City of Muskogee, supra, we discussed the obvious lack of similarity of the state laws and circumstances in Kramer and Cipriano to those in the City of Musko-

gee case. We adopt this discussion to show that the facts in Kramer and Cipriano are clearly distinguishable from those in the present case.

It is our conclusion that Art. 10, §35, of the Oklahoma Constitution does not violate the Equal Protection Clause of the Fourteenth Amendment.

Writ denied.

ALL JUSTICES CONCUR.